No. 12956

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLARENCE W. MOSELEY,

Appellant,

vs.

LAWRENCE C. MOSELEY, EDWARD S. FRANZUS, SANITEK PRODUCTS, INC., a corporation, and 111 SOUTH GAREY CORPORATION, a corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

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Jurisdiction.

The jurisdiction of the District Court in this case depended upon diversity of citizenship. (28 U. S. C. A. 1332.) A final judgment was rendered by that Court, which this Court has jurisdiction to review. (28 U. S. C. A. 1291.)

The amended complaint alleges that plaintiff is a citizen of the State of Oklahoma. [Tr. p. 4.] This allegation was denied for lack of information, but the uncontradicted evidence establishes the fact. [Tr. p. 47.] The amended complaint also alleges that defendants Lawrence C. Moseley and Edward S. Franzus are citizens of the State of California, and that defendants Sanitek Products, Inc., and 111 South Garey Corporation are California

corporations. [Tr. p. 4.] The answers of the defendants admit these allegations. [These answers were not printed, but appear at pp. 17, 24, 35 and 39 of the typed record certified by the Clerk of the District Court.]

The fact that the amount in controversy exceeds the jurisdictional amount of $3,000.00 is shown by the fact that the plaintiff, the appellant here, recovered judgment for $26,150.70, plus costs. [Tr. p. 37.]

Statement of Facts.

This is an action by a partner for an accounting following dissolution of the partnership. More accurately put, it is an action by a sub-partner for an accounting upon the dissolution of the main partnership and the sub-partnership. The plaintiff also charges a breach of trust, and seeks a determination of the remedies available to him as beneficiary of the trust. The case comes up on an appeal by the plaintiff from a judgment in his favor.

In 1941 the plaintiff and appellant Clarence W. Moseley and his brother, the defendant and appellee Lawrence C. Moseley, made an investment in the stock of Gerson-Stewart Pacific Corporation, which was carrying on the business of manufacturing and selling soaps and sanitation chemicals in Los Angeles, and they purchased additional stock of the company in 1943. In 1943 the corporation was dissolved, and its assets distributed in equal shares to the defendants and appellees Lawrence C. Moseley and Edward S. Franzus, who thereafter conducted the business as partners, under the name of Sanitek Products Company. The original investment, as well as the consideration for the additional stock, was contributed by the two brothers equally. One-half of the total consideration for the partnership interest taken in the name of defendant

and appellee Lawrence C. Moseley had been contributed by plaintiff and appellant Clarence W. Moseley.

In 1945, a written agreement [Tr. p. 16] was entered into between the plaintiff Clarence W. Moseley and the defendant Lawrence C. Moseley reciting the foregoing facts, and providing that the defendant Lawrence C. Moseley would hold in trust, for himself and the plaintiff Clarence W. Moseley, his interest in said partnership with the defendant Edward S. Franzus.

Under this arrangement Lawrence was to receive seventy-five per cent of the earnings from the one-half partnership interest beneficially owned by the two brothers, and the plaintiff Clarence W. Moseley was to receive twenty-five per cent. In other words, the total earnings of the business were to go fifty per cent to the defendant Edward S. Franzus, thirty-seven and one-half per cent to the defendant Lawrence C. Moseley, and twelve and one-half per cent to the plaintiff Clarence W. Moseley. The agreement provided, however, that the interest in capital assets would remain fifty-fifty, each brother being the beneficial owner of fifty per cent of a one-half partnership interest in the business, or twenty-five per cent of the total capital, the other fifty per cent of the total being owned by Franzus. There was no provision as to how long the agreement would continue. This discrepancy in the sharing of earnings, notwithstanding the fact that the investment of the brothers was equal, is explained by the fact that Lawrence was active in the business, and agreed to devote his full time and attention to it. [Par. 4 of the agreement, Tr. p. 19.]

The defendant Edward S. Franzus, at all times knew that the plaintiff had an interest in the one-half interest

of the defendant Lawrence C. Moseley in the business. [Tr. pp. 30, 51, 55-56.]

In 1947 without the knowledge or consent of the plaintiff the main partnership was dissolved, the dissolution taking effect as of October 31, 1947. [Tr. p. 28.] Certain cash and accounts receivable, in the amount of $51,-296.07, were distributed directly to the main partners, Lawrence C. Moseley and Edward S. Franzus [Tr. p. 29], and the remaining assets were transferred to two corporations, the stock of which was owned in equal shares by said Lawrence C. Moseley and Edward S. Franzus. Of the assets so transferred, the equipment, good-will, and the like went to defendant and appellee Sanitek Products, Inc., which is now carrying on the business. The real estate went to the defendant and appellee 111 South Garey Corporation, which leased it to the operating company, Sanitek Products, Inc.

The plaintiff, Clarence W. Moseley, first learned of these acts in a letter from his brother dated November 12, 1947, which stated that they had been accomplished. [Tr. pp. 30, 65-67, 68.]

The business has since been carried on by the corporations, or rather by one of them, Sanitek Products, Inc. The two former partners in the main partnership, Lawrence C. Moseley and Edward S. Franzus, own all of the stock, and each receives a salary.

The plaintiff did not receive any of the assets of the main partnership upon the dissolution thereof, and has not received any distributions from the business since. [Tr. p. 30.]

Questions Involved and How They Arise.

Plaintiff contends that the unauthorized transfer of assets to the two corporations constituted a breach of trust by the defendant Lawrence C. Moseley. This action was brought for an accounting, and to have such remedies for the breach of trust as the Court might determine.

The plaintiff has taken the position that he is entitled to a discovery of the earnings of the business from October 31, 1947, to date, and that he is not required to elect any remedy for the breach of trust until he has had an accounting in the sense of obtaining such information, but that if and to the extent that he is required to make any election, he wants an accounting in the sense of having his share of the distributions made to Lawrence C. Moseley from the business to date, determined in accordance with the 1945 agreement, and paid over to him.

The Trial Court held [Tr. p. 33] that on these facts the plaintiff was entitled to be paid the value of his interest in the business as of the date, October 31, 1947, when the main partnership was dissolved and the two main partners took the assets and transferred them (with the exception of certain cash and accounts receivable which they retained) to the two corporations owned by them, and that he had no other rights.

The value of plaintiff's share at October 31, 1947, was arrived at by stipulations of the parties, except for the value of the real estate and the goodwill of the business. The Court took evidence on the value of the last mentioned items, and made findings thereon, as to which no

question is raised in this proceeding. The parties also stipulated that $750.00 was due to the plaintiff from the defendant Lawrence C. Moseley on an accounting of distributions received by Lawrence prior to October 31, 1947. Judgment was given in favor of the plaintiff for the composite amount so determined, without interest, from which plaintiff appeals.

The learned Trial Court further ruled [Tr. p. 33] that when the main partnership was dissolved, the trust agreement of 1945, under which Lawrence held his one-half share of that partnership in trust for himself and Clarence, likewise terminated. With this conclusion we have no quarrel.

The contention of the plaintiff which raises the main question for determination by this Court, is that upon the dissolution of the main partnership and the resultant termination of the subsidiary agreement, it was the duty of the defendant Lawrence C. Moseley, as trustee for the plaintiff, to cause an accounting to be had, and to distribute to the plaintiff his share of the assets of the business, and that if an agreement could not be arrived at among the three interested persons as to the proper distributive shares, a judicial winding-up should have been had (and could still be had, subject to the right of the plaintiff to elect other remedies, as hereinafter stated).

It is the further contention of the plaintiff that the transfer of the assets to the corporations without his consent was a breach of trust on the part of the defendant Lawrence C. Moseley, and that, at his election, the plain-

tiff is entitled to have (1) the value of his share in such assets at the date of such breach, together with interest thereon from such date, or (2) the present value of his share in the business, together with his share of the distributions to date, or (3) that he is entitled to disregard the conveyance to the corporations, and to have an accounting in the sense of having his share of the earnings of the business and any other distributions therefrom ascertained and paid over to him, and that this right will continue until the business is properly wound up by judicial proceedings at the suit of any partner. The plaintiff has made it clear throughout that if and to the extent that he is required to make any election before he is informed what the earnings have been since October 31, 1947, he will elect this third alternative. [Tr. pp. 54 and 76.]

Specification of Errors.

1. The Court erred in concluding from the foregoing facts that under the terms of the 1945 agreement [Ex. A of Amended Complaint, Tr. pp. 16-20], plaintiff and appellant Clarence W. Moseley had only the right to be paid the value of his share of the business as of October 31, 1947; that the plaintiff's prayer for an accounting from the defendant Lawrence C. Moseley for all distributions paid to said defendant from the assets and earnings of the business for any period of time after the incorporation thereof should be denied; and that plaintiff had no right to pursue the trust funds and properties in the

hands of Lawrence C. Moseley into the two new corporations, or to require of Lawrence C. Moseley any accounting for any funds or properties received as a result of this enterprise after October 31, 1947. [Conclusion of Law I, Tr. p. 33.]

2. The Court erred in failing to find or conclude that upon the dissolution of the partnership (thereby, in accordance with the holding of the Court [Tr. p. 33], terminating the agreement of August 31, 1945), plaintiff was entitled to an accounting, and to receive his share of the assets of the business, and that the use thereof by the defendant Lawrence C. Moseley and the other defendants for their own purposes, including the transfer of part thereof to the two corporate defendants, was wrongful as to the plaintiff, and was a breach of trust on the part of the defendant Lawrence C. Moseley in his capacity as trustee for the plaintiff.

3. The Court erred in failing to find or conclude that as remedies for such breach of trust the plaintiff could elect to:

(a) Recover the value of his share in the business at the date the property was converted by the trustee to his own use, October 31, 1947, together with interest on such sum at the rate of 7 per cent per annum from said date; or

(b) Recover the present value of his share of the business, together with his share of the distributions to date; or

(c) Disregard the incorporation of the business, and continue to receive his share of the distributions from the business in accordance with the 1945 agreement, until a lawful liquidation and winding-up of the business takes place.

4. The Court erred in failing to find or conclude that the plaintiff Clarence W. Moseley is entitled to financial statements showing the earnings of the business after October 31, 1947, and in failing to find or conclude that the plaintiff should have the right to elect his remedy for the breach of trust after obtaining such information.

5. The Court erred in refusing to allow interest at the legal rate on the value of plaintiff's share in the business at October 31, 1947.

6. The Court erred in the following finding contained in Finding No. VI of the Findings of Fact. [Tr. p. 30.]

"The defendant at all times was willing to fully account to plaintiff and pay to plaintiff any sums found due on said accounting."

7. The Court erred in dismissing the action as to the defendants Edward S. Franzus, Sanitek Products, Inc., and 111 South Garey Corporation. [Tr. pp. 34 and 36.]

ARGUMENT.

I.

There Has Been a Breach of Trust by the Defendant Lawrence C. Moseley.

An analysis of the legal relationship between the parties may throw some light on the problem, although we submit that whatever view is taken of that relationship, it will necessarily be found that the defendant Lawrence C. Moseley had the obligations of a fiduciary to the plaintiff Clarence W. Moseley, that there was a breach thereof, and that the relationship was one of which the other defendants had knowledge, so that no transactions with them could cut off the plaintiff's rights in the property.

Initially, there was simply a joint venture between the brothers, in which they made a joint investment in stock of a corporation, Gerson-Stewart Pacific Corporation. When this corporation was dissolved, the defendant Lawrence C. Moseley and the defendant Edward S. Franzus, who was the other stockholder in the corporation, formed a partnership between themselves for the operation of the business, and the plaintiff allowed his share of the assets to go into this partnership. At this point we have a main partnership between Franzus and Lawrence, and a sub-partnership between Lawrence and Clarence, the subject matter of which was a one-half interest in the main partnership.

The brothers operated under agreements which were oral or expressed in correspondence until the agreement of August 31, 1945, was entered into, which was the last one. [Tr. p. 45.] It took effect as of January 1, 1945. [Tr. p. 19.] By the terms of this agreement Lawrence

C. Moseley became an express trustee for himself and his brother, the plaintiff Clarence W. Moseley, the trust *res* being the one-half interest in the main partnership held by Lawrence C. Moseley.

At this point the substance of the relationship is still a sub-partnership between the brothers, but the form is that of an express trust. One of the sub-partners, Lawrence, who was a main partner and active in the business, had expressly declared himself a trustee of his entire interest in the main partnership. When the main partnership was dissolved, this relationship could no longer continue in any active sense, so that the sub-partnership and the trust were necessarily terminated.

When a trust terminates by the expiration of its term or otherwise, the trustee is not immediately divested of all duties. He has the obligation to distribute the property to the beneficiaries in accordance with their interests, and the trust continues until that is done, or at least the trustee's duties continue. As stated by Scott in his work on Trusts, Volume 3, at page 1889:

> "When the time for the termination of the trust has arrived, the duties and powers of the trustee do not immediately cease, but until the trust is actually wound up, he has such duties and powers as are appropriate for the winding up of the trust. The trust ordinarily does not automatically terminate merely because the time for distribution has arrived; it is terminated only when the trustee has finally accounted and conveyed the trust property to the persons entitled to it on the termination of the trust."

Also, in the Restatement of Trusts, Section 345, page 1070, Volume 2, appears the following:

> "Upon the termination of the trust it is the duty of the trustee to the person beneficially entitled to the

> trust property to transfer the property to him or, if the trustee has possession but not title, to deliver possession to him."

The rule would be the same if we did not have in this case an express trust. When a partnership is dissolved, partners in possession are trustees for the other partners. (*Ruppe v. Utter,* 76 Cal. App. 19, 243 Pac. 715; *Kimball v. Baxter,* 67 Cal. App. 635, 228 Pac. 381.) As this Court said in *Pearson v. Higgins,* 49 F. 2d 47 (C. C. A. 9th, 1931), at page 49:

> "A notice of dissolution by one partner to his co-partner does dissolve the partnership but does not terminate a partnership relationship."

In this case the trustee, Lawrence C. Moseley, was not in a position to deliver to his beneficiary and partner, Clarence W. Moseley, any assets in kind, except, of course, that he should have paid to him his share of the cash, which he did not do. [Tr. p. 29, Finding IV, and Finding VI, Tr. p. 30.] As to the remainder of the assets the trustee was in this position: He had a right to have the main partnership judicially wound up. The normal procedure and the procedure which he had a right to require, in the absence of agreement between the persons interested, was to have the business sold and the proceeds distributed in cash. (2 Bates on Partnership, 989-990; *Sigourney v. Munn,* 7 Conn. 324; *Harper v. Lamping,* 33 Cal. 641; *Ruppe v. Utter, supra;* Corporations Code, Sec. 15038.) The applicable portion of this section reads as follows:

> "Sec. 15038. RIGHTS OF PARTNERS TO APPLICATION OF PARTNERSHIP PROPERTY. (1) When dissolution is caused in any way, except in contravention of the

> partnership agreement, each partner, as against his copartners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied *to pay in cash* the net amount owing to the respective partners." (Italics ours.)

It would seem clear, on principle, that Lawrence, as trustee for the plaintiff, was required to exercise whatever rights he had for the protection of plaintiff's interest. This was a duty imposed by law as well as by the express terms of the agreement. Paragraph 4 of the 1945 agreement reads as follows:

> "4. Lawrence C. Moseley agrees to devote his full time and attention to the business and affairs of said partnership, to diligently represent and protect the interest of himself and Clarence W. Moseley therein and to faithfully account to Clarence W. Moseley for the latter's share of the partnership share or interest so represented by him, together with all profits accruing thereto."

See also paragraphs 2 and 3, with respect to his duties upon a distribution of assets or earnings being made. [Tr. pp. 18-19.]

If no agreement had been reached and Lawrence had exercised his rights as a partner for the benefit of himself and Clarence, as beneficiary of his trust, the business would have been sold at a judicial sale, and purchased by one or more of the partners, or by an outsider, Clarence would have received his share, the value of which would have been determined by the actual sale, and he would have had the opportunity to bid the price up to his own idea of its value, rather than having it fixed by someone else.

It is unfair to any partner to compel him to accept what someone else determines is the value of his interest. As said by the Court in the case of *Sigourney v. Munn,* cited above, 7 Conn. 324 at 329:

> "Unless a settlement and division are agreed on, it contravenes every principle of natural justice, to hold, that one partner shall compel the other to accept what, according to the valuation, his interest is supposed to be worth."

When the main partnership was dissolved, Lawrence failed to perform his duty of submitting the matter to his brother for his agreement as to the disposition of the assets, or, in the absence of agreement, insisting upon a winding up of the business. Instead, Lawrence took the high-handed procedure of simply appropriating the assets, transferring them to corporations which he and Franzus owned, and giving an ultimatum to Clarence as to what he could do. [Tr. p. 66.]

This was a violation of a fundamental rule of trust law, which is expressed in Section 2229 of the Civil Code, as follows:

> "2229. Trustee Not to Use Property for His Own Profit. A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner."

The rule of partnership law is the same. A partner in possession of the assets of a dissolved partnership cannot carry on the business for his own benefit, whether in corporate form or otherwise. (*Kimball v. Baxter, supra; Ruppe v. Utter, supra.*)

The question remains of what the plaintiff's remedies are, and of when he has to make an election between them.

II.

The Plaintiff Is Entitled at His Election to Any One of Three Remedies for the Breach of Trust.

A. One Remedy Is to Recover the Value of Plaintiff's Share in the Business at the Time of Its Wrongful Taking, With Interest From That Date.

Clearly one of the remedies is to have the value of plaintiff's share in the business at the time it was taken over by the defendants. This is what the Trial Court allowed, but that Court refused to allow interest, contrary to all the authorities which we have been able to find on the subject.

Even in a case where the trustee's only wrongdoing is to continue the operation of a business without authority, the beneficiaries have the option of holding him accountable for the net profits, or of charging him with the value of the property, and interest.

In 2 Scott on Trusts, at page 1099, the author states:

> "Where the trustee continues without authority to carry on the business of the testator, the beneficiaries have the option of charging him with the value of the property so employed and interest, or of making him accountable for the net profits realized from carrying on the business. Before making their election they are entitled to an accounting with respect to the business."

The same rule is followed in partnership law. At 80 A. L. R., page 75, the author states:

> "It is generally held, where the assets of a firm have been used by one partner in continuing the business after dissolution, that the other partner or his

legal representatives may take either the profits attributable to the use of his interest in the assets or interest on his share of the capital."

The case of *Kimball v. Baxter,* 67 Cal. App. 635, hereinabove cited, is a square authority in California on the point. There, as here, the defendant repudiated his obligation to the plaintiff, and continued to carry on the business, transferring it to a corporation owned by him. This operation resulted in a loss, and the plaintiff elected to have the value of his share in the business at the time it was taken over by the defendant, with interest thereon. A judgment awarding him this relief was affirmed by the District Court of Appeal, and a petition for hearing was denied by the Supreme Court.

On the question of interest, the fact that the defendant Lawrence C. Moseley made a deposit, under Court order, of a sum of money before the judgment was rendered [Tr. p. 21], should not prevent interest from running upon the entire value of plaintiff's share in the business. There was no provision in the order, or otherwise, that the plaintiff could accept this money without prejudice to the right to claim a larger sum. Therefore it could not prevent the running of interest. (*Mutual Life Insurance Co. v. Wells Fargo Bank,* 86 F. 2d 585 at 588 (C. C. A. 9th, 1936).)

It may well be true that the plaintiff cannot claim any interest on the judgment from the date of its rendition, because at the time it was rendered an additional sum, making up the full amount thereof, was deposited in Court. Plaintiff has not been able to take down any part of that money, because he could not accept the benefit of the judgment without losing his right to appeal. On the

authority cited, however, it would seem clear that interest between October 31, 1947, and February 26, 1951, the date of the judgment, at the rate of 7 per cent per annum, must be included, if the plaintiff elects the remedy which the Trial Court has partially afforded him, or if this Court confines him to that remedy.

The amount on which interest should run is $25,400.70. The additional amount of $750.00 which was included in the judgment, bringing the total up to $26,150.70, represents the balance due on a stipulated accounting under the 1945 agreement for periods prior to October 31, 1947.

B. The Plaintiff Should Have as an Alternative Remedy the Right to the Present Value of His Share, Together With His Share of Earnings to Date.

The beneficiary of a trust should not be limited to recovering the value of the property at the time of its wrongful appropriation by the trustee, with interest thereon. He should be allowed to have the present value of his share, if he desires it, together with his share of any profits which have been made in the interval. In other words, he should have the right to be put in the same position as if the breach of trust had not occurred. (2 Scott on Trusts, p. 1113, Sec. 208.3.) This option is also given to the beneficiary of a trust by Section 2237 of the Civil Code. That section reads as follows:

> "2237. Measure of Liability for Breach of Trust. A trustee who uses or disposes of the trust property, contrary to section 2229, may, at the option of the beneficiary, be required to account for all profits so made, or to pay the value of its use, and, if he has disposed thereof, to replace it, with its fruits, or to account for its proceeds with interest."

C. The Third Remedy Is an Accounting.

Where, as here, the trust property can be restored, or its attempted disposal disregarded, the beneficiary is entitled to specific enforcement of the trustee's duties. (2 Scott on Trusts, 1077.) That would be in this case simply an accounting, partial or complete, *i. e.*, with or without a winding up of the business.

If there had been only two people interested, that is, if the plaintiff had been carrying on the business for the benefit of himself and his brother, the situation would be so clear that there could hardly be any argument about it. Does the fact that plaintiff was only a sub-partner in relation to the defendant Edward S. Franzus make any difference?

The plaintiff not only had the indirect right to an accounting through his trustee and partner, Lawrence C. Moseley, but, as a sub-partner, he had the right to a direct accounting. He was entitled himself, upon dissolution of the main partnership, or in any other circumstances which would render an accounting proper as between the main partners, to bring such an action, and to have an accounting for his share of the entire business. This would be true whether or not the other main partner knew about plaintiff's interest. (*Nirdlinger v. Bernheimer,* 133 N. Y. 45, 30 N. E. 561.) *A fortiori* he had the right to an accounting, when the other main partner knew that he had an interest. (*Lovejoy v. Bailey,* 214 Mass. 134, 101 N. E. 63; *Replogle v. Neff,* 176 Okla.

333, 55 P. 2d 436.) In this case the Court states at page 439 of the Pacific Reporter:

> *"A sub-partner may maintain an equitable action against the firm to determine his share in the portion due the partner with whom he contracted."*

At the time when the main partnership was dissolved, therefore, plaintiff, as a sub-partner, had the same right to an accounting as if he had been one of the main partners. He still has that right.

The only change which has taken place is that certain partnership assets have been transferred to the two defendant corporations [Tr. p. 78], and this was done without the plaintiff's consent. [Tr. p. 30.] These corporations are wholly owned by the two main partners, Lawrence C. Moseley and Edward S. Franzus, and they are directors and officers thereof. [Tr. p. 29.]

Franzus is chargeable with full knowledge of the relationship between the plaintiff and the defendant Lawrence C. Moseley. He knew that the interest which Lawrence had in the business was owned by Lawrence and Clarence, each having fifty per cent. [Tr. p. 56.] The fact that he did not know [Tr. p. 30] of the specific terms of the final agreement between the brothers, the written agreement of 1945, is immaterial. As said by the Court in *Sigourney v. Munn,* cited above, 7 Conn. at 333:

> "Whatever is sufficient to put a person on enquiry, is considered in equity as conveying notice; as the law imputes to a person the knowledge of a fact, of which the exercise of common prudence and ordinary diligence must have apprised him."

The knowledge of the officers and directors and only stockholders of the two corporations must, of course, be imputed to them. The corporations, therefore, stand in the shoes of the individual defendants. *Lovejoy v. Bailey, supra,* and see Section 2243 of the Civil Code, which reads as follows:

> "2243. THIRD PERSONS, WHEN INVOLUNTARY TRUSTEE. Every one to whom property is transferred in violation of a trust, holds the same as an involuntary trustee under such trust, unless he purchased it in good faith, and for a valuable consideration."

The plaintiff's first cause of action is for an accounting. Upon the authorities hereinabove cited, a complete accounting would include the right to have the business wound up and all assets, or the proceeds of sale thereof, distributed to the partners. Plaintiff has not asked for such relief at this time, and none of the other partners has done so. On this branch of the case, the plaintiff has confined himself, so far, to requesting that there be a determination of his interest, and that there be paid over to him any distributions which have been made from the business and are in the hands of any of the other defendants, and should be properly paid to him. In other words, he seeks the same relief as was accorded to the plaintiff in *Replogle v. Neff,* 55 P. 2d 436 at 437.

In an accounting of earnings, the corporations should be disregarded and the situation treated as if the individual defendants had continued to carry on the business in partnership form. Salaries paid should be treated as a distribution to partners, and the matter of compensation for services should be determined by the Court. (*Love-*

joy v. Bailey, 101 N. E. 63 at 71.) (In this connection, while the agreement does not so provide, and the Trial Court would not receive evidence upon it, the reason for the division of the earnings from the brothers' one-half share of the business giving three-quarters thereof to Lawrence and one-quarter to the plaintiff Clarence, was to compensate Lawrence for his services. Plaintiff has no objection to such compensation being continued.)

This is the remedy elected by plaintiff if, and only if, he is required to elect in advance of having information as to the earnings of the business since the dissolution of the partnership on October 31, 1947.

III.

The Plaintiff Should Not Be Required to Elect His Remedy for Breach of Trust Until He Knows the Facts.

As shown above in the quotation from 2 Scott on Trusts at page 1099, when a trustee continues to carry on the business of a testator without authority, the beneficiaries, before making an election, are entitled to an accounting with respect to the business. The word accounting is here used in the sense of furnishing information. This should apply with greater force where there has been a repudiation of the trust and an adverse use of the business.

Wells Fargo v. Robinson, 13 Cal. 133, is a California case on the subject. There the defendant had embezzled

funds belonging to the plaintiff, and invested these funds in certain property. Plaintiff had filed an action at law to recover the money, and then filed this suit in equity to impose a trust upon the property which had been acquired with the embezzled funds. At page 142, the Court quotes Mr. Justice Story on the question of election:

> "Questions have also arisen in Courts of Equity, as to the time when, and the circumstances under which, an election may be required to be made. The general rule is, that the party is not bound to make an election, until all the circumstances are known, and the state, and condition, and value of the funds, are clearly ascertained; for, until so known and ascertained, it is impossible for the party to make a discriminating and deliberate choice, such as ought to bind him to reason and justice. If, therefore, he should make a choice in ignorance of the real state of the funds, or under misconception of the extent of the claims on the fund, elected by him, it will not be conclusive on him. And, on the other hand, he will be entitled, in order to make an election, to maintain a bill in equity for a discovery, and to have all the necessary accounts taken to ascertain the real state of the funds."

It is submitted that the plaintiff should be entitled in this case to a discovery of the earnings of the business since it was wrongfully taken over by the defendants, and the present condition thereof, before he is forced to make an election.

IV.
Other Errors.

Turning now to some of the subsidiary assignments of error, the Court erred in its Finding No. VI, as follows:

> "The defendant at all times was willing to fully account to plaintiff and to pay to plaintiff any sums found due on said accounting." [Tr. p. 30.]

There is no dispute about the facts of this case, and this finding is assigned as error only because it may be given a broader meaning than it should have, "accounting" being a flexible term.

In Finding No. XI [Tr. p. 32], the Court found as follows:

> "The defendant Lawrence C. Moseley has at all times been willing to account to the plaintiff for all distributions made to said defendant for the period prior to October 31, 1947, but has refused to account for any distributions made to said defendant on or after said date by the corporate success *(sic)* of the partnership, and has refused to furnish any financial statement of the business occurring since said date."

The word "success" in the foregoing should obviously be "successor."

This finding makes clear that there has been a refusal to account to plaintiff for the only period as to which there has ever been any real controversy, to wit, the period since October 31, 1947. Any possible doubt about this fact will be removed by reference to the colloquy between Court and counsel on the last day of the trial. [Tr. pp. 77-78.]

The Court erred in dismissing the action as to the defendant Edward S. Franzus and the defendant corpora-

tions. It may be that plaintiff will be content to have judgment, on one of the three theories discussed above, against the defendant Lawrence C. Moseley only. On the other hand, it is possible that the plaintiff will require a final and complete accounting in the sense of having the business wound up, and capital as well as earnings distributed. In that event the other defendants are necessary parties because they all have an interest in the property which is the subject of the action. (*Settembre v. Putnam,* 30 Cal. 490, at 497.)

Furthermore, if the plaintiff elects to have a judgment for the value of his interest in the business, past or present, this judgment might run not only against the defendant Lawrence C. Moseley, but also against the defendant corporations, as constructive trustees in possession of the assets. Mr. Scott takes the view that if the beneficiary does not wish the property, he can have judgment against the constructive trustee for its value, even though the constructive trustee still has the property and could return it, where, as here, the transferee knew that the transfer was in breach of trust, and that the trustee intended to misappropriate the property. (2 Scott on Trusts, 1608.)

Conclusion.

Summing up the case, it appears that there was a breach of trust on the part of the defendant Lawrence C. Moseley in transferring or joining in the transfer of partnership assets to the defendant corporations without plaintiff's consent; that the defendant Edward S. Franzus and the corporate defendants are chargeable with knowledge of such breach; that the plaintiff is entitled to a discovery of the earnings of the business since October 31,

1947, the date of such transfer to the corporations; and that he should thereafter have the right to elect any remedy which the law affords him for such breach of trust, including the following:

(1) To have judgment for the value of his share of the business as of October 31, 1947, determined in accordance with the agreement of 1945, together with interest on such value at 7 per cent from October 31, 1947; or

(2) To have judgment for the present value of his share of the business, together with his share of all distributions made from the business to the defendant Lawrence C. Moseley between October 31, 1947, and the date of the judgment, such share of present value and prior distributions to be determined in accordance with the 1945 agreement; or

(3) To have a complete or partial accounting, including the right to recover from the defendant Lawrence C. Moseley the sum of $750.00, being the stipulated amount due to the plaintiff on such accounting before October 31, 1947, and plaintiff's share of all distributions from the business made by way of salary or otherwise to said defendant after October 31, 1947, the determination of plaintiff's share of capital or income in any such accounting to be in accordance with the 1945 agreement, and to be calculated as if the business had remained a partnership.

Respectfully submitted,

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